

The Fusion of Gay Rights and Feminism: Gender Identity and Marriage After *Baehr v.* *Lewin*

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*"Then you should say what you mean," the March Hare went on.
"I do," Alice hastily replied; "at least—at least I mean what I say—that's
the same thing, you know."¹*

Looking back on judicial decisions, we are nonplussed. An unexpected opinion becomes explicable after it occurs. And, after it occurs, its significance and meaning change. The opinion shakes expectations and reverberates within its environment—becoming not an Augustinian absolute, but rather an existential signpost to be observed, ignored or struck down. A decision from the Supreme Court of Hawaii, *Baehr v. Lewin*,² has similarly shaken equal and fundamental rights jurisprudence,³ and it raises the specter of relativity in our

¹ LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* 98 (MacMillan 1992) (1st ed. 1866).

² *Baehr v. Lewin*, 852 P.2d 44 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993). The *Baehr* court included: two justices, one acting as chief justice; two judges from the Intermediate Court of Appeals, replacing two recused justices; and a retired justice appointed for a temporary term to fill a vacancy. *Id.* The opinion was written by Associate Justice Levinson and was joined by Acting Chief Justice Moon. *Id.* Chief Judge Burns from the Intermediate Court of Appeals concurred in the result. *Id.* at 68. Intermediate Court of Appeals Judge Heen dissented. *Id.* at 70. Associate Justice Hayashi would have joined in the dissent except that his temporary appointment expired before the filing of the opinion. *Id.* at 48.

³ I use these terms together, as the distinction is not clear. What is a fundamental right? Which groups deserve to be treated equally? What is equal? Which interests require minimum equal standards, which require something more than minimum equal standards? Which laws should be supported with a rational basis, which with a compelling interest?

I therefore cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. To be sure, some interests which the Court has deemed to be fundamental for purposes of equal protection analysis are themselves constitutionally

language, system and beliefs.

The *Baehr* plurality holds: (1) sex-based distinctions are suspect for purposes of equal protection analysis and are subject to the strict scrutiny test; (2) the Hawaii marriage statute⁴ discriminates on the basis of sex; and (3) the statute violates the Hawaii Constitution unless the state can justify it by proving a compelling state interest.⁵ Although *Baehr* will probably legalize same-sex marriage, it accepts earlier precedent holding that there is no fundamental right to marriage and sidesteps the question of discrimination based on sexual orientation. Most importantly, *Baehr* implicitly adopts social constructionist⁶ tenets by redefining (or recognizing changing definitions of) sex-based categories and marriage.

Gay activists will cheer *Baehr* for its end but not its means. In *Bowers*, gays were denied their right to have sex, and in *Baehr* gay rights traded its separate identity for a place in the gender/race-family. Some may wonder if *Baehr* is a gay rights case at all; nevertheless, whatever the language, *Baehr* changes the gay-legal landscape. First, by juxtaposing racial, gender, and sexual orientation language *Baehr* re-humanizes judicial treatment of gays. Second, *Baehr* opens a door around *Bowers* by recognizing a consanguinity between gender and sexual orientation. Third, *Baehr* raises the possibility of a fuller examination of sex-based equal rights, which recognizes subtle and institutional sexism. *Baehr* is a monumental civil rights case—the first to fulfill Brennan's prediction of expanding state constitutionally-based rights.⁷

fundamental for purposes of equal protection analysis are themselves constitutionally protected rights.

San Antonio Ind. Sch. Distr. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting).

⁴ HAW. REV. STAT. § 572-1 (1985).

⁵ *Baehr*, 852 P.2d at 44.

⁶ Social constructionists believe that sexual orientation—and even gender—are concepts created by society over time. No one is born gay. For example, societal forces make a person gay, or societal forces make others perceive that person as gay. The concept of a gay person is created by society. Social constructionism rejects the idea that there is a natural law and that behavior is biologically fated (essentialism). For a good introduction to social constructionism and essentialism, see EVE K. SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 40-66 (1990); John Boswell, *Revolutions, Universals, And Sexual Categories*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY & LESBIAN PAST* 17-36 (Martin B. Duberman et al. eds., 1989) [hereinafter Duberman]; Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833 (1993); Robert Padgug, *Sexual Matters: Rethinking Sexuality in History*, in Duberman *supra*; David Gelman, *Born or Bred?*, NEWSWEEK, Feb. 24, 1992, at 46.

⁷ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) ("Of late, however, more and more state courts are

Throughout this Note, I discuss social constructionism in the law. In this context, the law defines gay identity and is defined by it. Courts and gay legal advocates respond to each other—changing the terminology and the discourse. Part I introduces the issues and context in which *Baehr* was decided and will be examined. Part II introduces socio-legal developments in the gay rights movement as they relate to recognition of same-sex couples. Part III explicates the *Baehr* decision. Part IV examines the resonance between sexual orientation and gender equal and fundamental rights terminology. Part V introduces full faith and credit and choice of law questions that *Baehr* will soon engender in the courts.

I. CONTEXT

Hawaii is as likely a place as any to lead a redefinition and broadening of our civil rights or—depending on your beliefs—weakening of our institutions and Judeo-Christian values. Perhaps because Hawaii is not traditionally Judeo-Christian,⁸ because the modern taboos against same-sex love are least rooted there,⁹ and because Hawaii has the strongest protections against sexism,¹⁰

construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased.”)

⁸ Only 33% of the Hawaiian population is white. Japanese, Filipino, and Chinese descendants comprise another 44% of the Hawaiian population. ALMANAC OF THE 50 STATES: BASIC DATA PROFILES WITH COMPARATIVE TABLES 92 (Edith R. Hornor ed., 1994).

⁹ “Hawaii has a long tradition of tolerance for ethnic diversity and alternative lifestyles, including homosexuality.” *Day One: Dearly Beloved—Gay Marriages Legal in Hawaii?* (ABC television broadcast, June 13, 1994). “Recent research shows that before missionaries arrived here, homosexual relationships were accepted in Hawaii. Hawaiian kings and chiefs openly took male lovers.” Susan Essoyan, *Hawaii Tries to Take a Stand Against Same Sex Marriages*, L.A. TIMES, Apr. 26, 1994, at A5.

Sleeping here, sleeping there. That was an accepted custom of Hawaiian life before the missionaries.

Relationships were defined by the people in them, not by outside institutions. Some lasted a lifetime. Others faded as quickly as footprints erased by the morning tides. And love between people of the same sex was as common as the white sand beaches and coconut palms fluttering in the warm island breezes.

Immediately after they began arriving in 1820, the missionaries imposed their view of life on the Hawaiians. All but heterosexual marriage became kapu—forbidden—requiring all other romantic love to be hidden.

Deb Price, *Hawaii Couple Try To Break Lock on Marriage*, THE DETROIT NEWS, Dec. 11, 1992, available in LEXIS, NEWS Library, ARCNWS File.

Hawaii has often been the first to assimilate "radical" ideas. For example, Hawaii was the first state to legalize abortion,¹¹ the first to approve the Equal Rights Amendment,¹² and among the first to prohibit discrimination based on sexual orientation.¹³

Hawaii has among the fewest social and legal barriers based on sex and sexual orientation, and now with *Baehr*, Hawaii has become the first state to require that the remaining legal barriers be justified by compelling state interests.¹⁴ And while public opinion polls and legislative activity suggest that a majority of Hawaiians oppose the *Baehr* decision,¹⁵ significant groups have acquiesced to or supported it.¹⁶ Even those groups opposed to the decision seem ready to compromise with an offer that leapfrogs any official recognition of same-sex couples yet seen in this country.¹⁷ If on remand and successive

¹⁰ See, e.g., HAW. CONST. art. 1, § 5 (1978): "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." (emphasis added).

¹¹ Essoyan, *supra* note 9.

¹² *Id.*

¹³ See *id.*; HAW. REV. STAT. §§ 368-1, 489-1 to -8 (Supp. 1992). In 1983 Wisconsin passed the first such law. See WIS. STAT. ANN. § 111.31 (West 1988).

¹⁴ Although this statement may be overly broad, the *Baehr* plurality has dramatically broadened the scope of the equal rights provision of the Hawaii Constitution. *Baehr v. Lewin*, 852 P.2d 44, 44 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

¹⁵ 58% percent of Hawaiians say they oppose same-sex marriages. Essoyan, *supra* note 9; 61% of Hawaiians say they oppose legalization of same-sex marriages. ADVOC., July 27, 1993, at 18.

"The possible legalization of gay marriage by Hawaii's courts has produced more than just outrage. There's an organized political effort to stop it." *Day One*, *supra* note 9.

¹⁶ The Japanese-American Council voted to support the legalization of same-sex marriages. Steven A. Chin, *Vote for Gay Marriage Followed Uphill Fight; Issue Divides Japanese American Citizens League*, S.F. EXAMINER, Aug. 10, 1994, at A4. "[A] threat to the civil rights of one American is a threat to the civil rights of all Americans." *Id.* (quoting Rep. Norman Mineta, JACL member).

"If you look at the historical arguments why black and white shouldn't mix or yellow and purple or whatever, it was because it was immoral. And that's the same kind of argument and hysteria that's being debated with regards to same-sex marriage." Deb Price, *Same-Sex Marriage Gets New Voice*, CHIC. SUN-TIMES, Sept. 30, 1994, at 39 (editorial quoting Bill Kaneko, the immediate past Vice President of the national JACL). Japanese Americans make up 22% percent of the Hawaii population. *Id.*

¹⁷ I am referring to domestic partnership and to adult adoption. As the saying goes, what's old is new again. Professor Boswell suggests that adult adoption was practiced during the Roman Empire.

appeal this decision becomes something other than it now is, it will still be a "wedding bell heard around the world."¹⁸

Other states, courts and legislatures will have to grapple with *Baehr*,¹⁹ or with *Baehr*'s acceptance of relative and fluid definitions of gender and sexual orientation in much the same way as other courts have previously adapted to relative and fluid definitions of sexual orientation and sexual acts.²⁰ As gay activists have differed in their willingness to disassociate sexual orientation and sexual acts,²¹ they are likely to be equally unharmonious in their reaction to *Baehr*'s association of gender and sexual orientation and implicit disassociation of same-sex marriages and sexual orientation. In addition, *Baehr* increases the

A third type of formal same-sex union involved the legal practice of "collateral adoption": one man adopted another as his brother.

Under the early empire men began to adopt as *brothers* (rather than as sons) persons who thus became heirs but not children.

JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE 97 (1994) (footnotes omitted).

¹⁸ "[*Baehr* may be] the most far-reaching civil rights case since the U.S. Supreme Court overturned laws against interracial marriage in 1967." Michael Gray, *Hawaii Could Be the First State to OK Same-Sex Marriage*, S.F. EXAMINER, Feb. 20, 1994, at A22.

¹⁹ If *Baehr* stands, other states will inevitably have to decide whether to recognize a Hawaii same-sex marriage. This full faith and credit problem will be introduced in *infra* part IV.

²⁰ See, e.g., *Watkins v. United States Army*, 837 F.2d 1428 (9th Cir.), *modified*, 847 F.2d 1329 (9th Cir. 1988) (en banc), *cert. denied*, 498 U.S. 957 (1990).

In this opinion we use the term "sexual orientation" to refer to the orientation of an individual's sexual preference, not to his actual sexual conduct. Individuals whose sexual orientation creates in them a desire for sexual relationships with persons of the opposite sex have a heterosexual orientation. Individuals whose sexual orientation creates in them a desire for sexual relationships with persons of the same sex have a homosexual orientation.

In contrast, we use the terms "homosexual conduct" and "homosexual acts" to refer to sexual activity between two members of the same sex whether their orientations are homosexual, heterosexual, or bisexual

Id. at 1429 n.1.

²¹ "It is incredibly harmful to argue that there is a valid distinction between status and conduct. If I can be a lesbian but am not allowed to ever sleep with women, I'm not interested in being a lesbian. Even when we win these cases by making the status-conduct distinction, we win the battle but lose the war." Chris Bull, *Choosing Up Sides*, ADVOC., July 12, 1994, at 29 (quoting Chai Feldblum, an openly lesbian law professor at Georgetown University).

legal ties between feminism and gay rights;²² an interplay that finds its origin in the development of a group identifiable by its sexual acts and (more recently) orientation.²³ Commonality in the feminist and gay rights movement has been recognized by feminist scholars for some time.²⁴

There is nothing determinative in the Constitution or the opinions of the U.S. Supreme Court as to the reach of the *Baehr* decision.²⁵ The Full Faith

²² By deciding *Baehr* on gender grounds, the plurality may have eliminated the separate, legal identity of gay people and gay rights. See *infra* part III. Professor Steven Epstein argues that gay identity is based on the ability to organize around the category of "gayness." "How do you protest a socially imposed categorization, except by organizing around the category? Just as blacks cannot fight the arbitrariness of racial classification without organizing as *blacks*, so gays could not advocate the overthrow of the sexual order without making their gayness the very basis of their claims." Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, SOCIALIST REV. May-Aug. 1987, at 9, 19. For a discussion of the creation of sexual categories, see Ed Cohen, *Who Are "We"? Gay "Identity" as Political (E)motion (A Theoretical Ruminantion)*, in INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 81-82 (Diana Fuss ed., 1991).

²³ See, e.g., ANDREA DWORKIN, INTERCOURSE (1987); CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 27 (1987); SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM (1988).

Patriarchy—an enforced belief in male dominance and control—is the ideology and sexism the system that holds it in place. The catechism goes like this: Who do gender roles serve? Men and the women who seek power from them. Who suffers from gender roles? Women most completely and men in part. How are gender roles maintained? By the weapons of sexism: economics, violence, homophobia.

Id. at 8.

²⁴ PHARR, *supra* note 23, at 8; Adrienne Rich, *Compulsory Heterosexuality and Lesbian Experience*, in THE LESBIAN AND GAY STUDIES READER 227, 227-54 (Henry Abelove et al. eds., 1993). *Contra* SEDGWICK, *supra* note 6.

The Study of sexuality is not coextensive with the study of gender; correspondingly, antihomophobic inquiry is not coextensive with the study of gender; correspondingly, antihomophobic inquiry is not coextensive with feminist inquiry. But we can't know in advance how they will be different.

Id. at 27.

²⁵ The Supreme Court has examined the validity of legal "status" in a state other than the forum state. For a clear analysis see *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (full faith and credit does not compel one state to substitute statutes of other states for its own statutes dealing with subject matter with which it is competent to legislate); *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (forcing a Mississippi court to enforce a Missouri judgment recognizing the validity of a contract that was illegal under Mississippi law).

and Credit Clause will not necessarily require other states to recognize *Baehr*. Instead, courts will taste it over and over, each time seasoned by new facts relating to the interests of the foreign state(s), the property or rights at stake, and the policies in balance.²⁶ Some states will spit out the *Baehr* decision,

Family law questions—foreign divorce decrees, constructive divorce decrees, marriage licenses, and marital property—have also faced full faith and credit scrutiny in the Supreme Court. In each of these cases, the Court seems to balance the forum state's public policy interests against the interest in comity. The Court's analysis, however, fails to create a determinative framework. *See, e.g., infra* part IV; *Simons v. Miami Beach First Nat'l Bank*, 381 U.S. 81 (1965) (constructive divorce decree extinguished wife's right to intestate succession); *Aldrich v. Aldrich*, 378 U.S. 540 (1964) (invalid Florida divorce decree had to be given full faith and credit in West Virginia: the judgment could not be challenged); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957) (constructive divorce decree in Nevada did not extinguish wife's rights under New York law); *Armstrong v. Armstrong*, 350 U.S. 568 (1956) (Ohio court allowed to adjudicate wife's right to alimony even though there was a valid constructive divorce decree in Florida); *Yarborough v. Yarborough*, 290 U.S. 202 (1933) (Georgia consent decree fixing child support payments held *res judicata* and entitled to full faith and credit in South Carolina); *United States v. Snyder*, 177 F.2d 44 (D.C. 1949) (holding that a bigamous marriage created by the invalidity of a prior Mexican divorce is an exception to the rule that a marriage which is valid where it was performed is valid everywhere).

The Court has also failed to create a determinative full faith and credit framework for workers' compensation claims and personal injury actions. *See Carroll v. Lanza*, 349 U.S. 408 (1955) (in a personal injury case, the forum state's interest is so strong that the forum state need not grant full faith and credit to the home state); *Hughes v. Fetter*, 341 U.S. 609 (1951) (Wisconsin statute refusing to recognize other states' wrongful death right of action violates the Full Faith and Credit Clause); *Industrial Comm'n v. McCartin*, 330 U.S. 622 (1947) (full faith and credit should not bind a forum state to recognize a home state's exclusive remedy for employment-related injury provision); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939) (forum state has interest in awarding compensation to an injured worker that allows it to apply its law instead of the law of the home state); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) (home state is allowed to apply its own personal injury laws in a case where the nonresident alien was injured outside of the state but signed the employment contract in the state).

²⁶ For an introduction to full faith and credit see Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95 (1984); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986); Sanford N. Caust-Ellenbogen, *False Conflicts and Interstate Preclusion: Moving Beyond a Wooden Reading of the Full Faith and Credit Statute*, 58 FORDHAM L. REV. 593 (1990); Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945); Willis L.M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153 (1949); William H. Rodgers, Jr. & Linda A. Rodgers, *The Disparity Between Due Process and Full*

finding it obnoxious to its public policy;²⁷ some may swallow it whole, as the "better law";²⁸ most will nibble at it bit by bit.²⁹ Each case will present a decision potentially reviewable by the Supreme Court.

In this process, the relativity of the terms "sexual orientation," "gender," and "sexual acts" will infuse and destabilize the status of marriage and further disassociate concepts and principles in our ever-fluid equal and fundamental rights laws. In considering one issue—in the context of full faith and credit³⁰—our courts will return again and again to the initial question of definitions, changing them by their very reliance upon them.

II. SAME-SEX COUPLES: NEW CONCEPT OR NEW DISTASTE

The late Professor John Boswell examined the history of gay relationships throughout his career.³¹ In his most recent work,³² he argued that the Catholic Church has had a long history of recognizing same-sex unions.³³ The study is not as much an argument that same-sex couples have existed throughout time as it is an argument that modern fear and distaste are not solely products of the church.³⁴ Similarly, Professor Eskridge recently examined same-sex couples

Faith and Credit: The Problem of the Somewhere Wife, 67 COLUM. L. REV. 1363 (1967); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. L. REV. 1 (1981); Ronald A. Hecker, Note, *Full Faith and Credit to Judgments: Law and Reason Versus the Restatement Second*, 54 CAL. L. REV. 282 (1966).

²⁷ The Restatement (Second) of Conflict of Laws indicates that polygamous marriages, certain incestuous marriages, or the marriage of minors below a certain age may be sufficiently contrary to a strong public policy of a state as to require invalidation by the forum state. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1969).

²⁸ See Leflar, *infra* note 163 and accompanying text.

²⁹ I argue that the courts will probably go through an evolutionary process in recognizing same-sex marriages. First, same-sex marriages will be recognized only in certain circumstances and without the currently recognized marital rights. Over time, the circumstances in which the marriage is validated will broaden. Some of the rights of marriage may then be give to same-sex marriages, but not the status. See, e.g., *In re Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. Ct. App. 1948) (allowing the two wives of a foreign sheik to recover the proceeds of a California bank account through interstate succession).

³⁰ U.S. CONST., art. IV, § 1.

³¹ Boswell's work includes: JOHN E. BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1980) [hereinafter *SOCIAL*]; JOHN E. BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994) [hereinafter *UNIONS*].

³² BOSWELL, *UNIONS*, *supra* note 31.

³³ *Id.* at 281.

³⁴ "Much of the present volume, on the other hand, is specifically intended to rebut the common idea that religious belief—Christian or other—has been the *cause* of intolerance in

throughout Western and particularly non-Western history.³⁵ He rejects contemporary arguments that suggest there is no basis for recognizing same-sex marriages because same-sex marriage is an oxymoron. In fact, scholars seem to have moved past a search for same-sex relationships in history to an examination of the identification and separateness of these relationships in the broader society.³⁶

Many people are familiar with male same-sex relationships common in classical Greece.³⁷ These transgenerational couplings of a citizen (or, outside of Greece, an aristocratic elder) and a boy existed throughout the classical world in similar forms—in the Aegean Islands, Egypt, Japan, and China.³⁸ Some historians suggest these relationships were similar to different-sex relationships of the period(s) in that the elder male would court a boy and seek permission from the boy's family. In each of these cultures, same-sex coupling primarily occurred among elite males. Moreover, roles in these relationships were static and reflective of broader class and gender roles. Men did not take on

regard to gay people." BOSWELL, *SOCIAL*, *supra* note 31, at 6.

³⁵ William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

³⁶ See generally GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940* (1994); LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 42-43 (1991); JONATHAN N. KATZ, *GAY AMERICAN HISTORY: LESBIANS & GAY MEN IN THE U.S.A.* (Meridian 1992); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

³⁷ See, e.g., David Halperin, *Sex Before Sexuality: Pederasty, Politics, and Power in Classical Athens*, in Duberman, *supra* note 6, at 37.

³⁸ Eskridge, *supra* note 35; Paul G. Schalow, *Male Love in Early Modern Japan: A Literary Depiction of the "Youth,"* in Duberman, *supra* note 6, at 118; Vivien W. Ng, *Homosexuality and the State in Late Imperial China*, in Duberman, *supra* note 6, at 76.

Note that Boswell argues that the same-sex relationships in classical Rome were companionate. See BOSWELL, *SOCIAL*, *supra* note 31, at 61-87.

Although it is impossible to label all of the same-sex activity in these cultures neatly, the following summary provides a useful framework.

[H]omosexual relations . . . are likely to be organized in one of three broad patterns: (1) between adults and youths . . .; (2) between persons who abide by their culture's gender conventions (i.e. "feminine" women and "masculine" men) and persons who assume the cultural status of the other sex or of an "intermediate" gender; and (3) between persons of equal age and status (as is conventional in our own society). Considerable evidence also exists of homosexual relations between men whose status is differentiated as superordinate and subordinate on the basis of class or race.

George Chauncey, Jr. et al., *Introduction*, in Duberman, *supra* note 6, at 9.

companionate same-sex relationships but, rather, transgenerational relationships in which the adult, male role was dominant. "In Classical Athens," writes Professor Halperin, "sexual partners came in two different kinds—not male and female but active and passive, dominant and submissive."³⁹

Only in less rigid societies⁴⁰ where distinctions between males and females were more often based, at least in part, on ability and inclination rather than status is there consistent evidence of companionate relationships and consistent accounts of female same-sex couplings.⁴¹ Where this did occur, the gender lines were blurred. In some Native American cultures, for example, men who dressed and had the sensibilities of women—Berdache—were revered as being closer to the spirit.⁴² Some families raised their boys to be a Berdache. Similarly, there are examples of women huntresses with a wife or wives at home.⁴³

Where there were essentially classless and non-sexist societies (or at least less sexist and less classist societies) men and women formed relationships as ostensible equals. Though same-sex coupling was prevalent in Classical societies, it molded to class and gender roles in which a white male ruled society and the bed.⁴⁴ Where there is no evidence of same-sex companionate relationships, they may have been hidden not because sodomy was forbidden, but because same-sex sexual acts and relationships between two equal men would necessarily place one of those men in the role of a wife, boy, slave,

³⁹ Halperin, *supra* note 37, at 50.

⁴⁰ For example, these less rigid societies include: Native American Nations, premodern African nations, and premodern South American Nations. It should be noted that there is some evidence of companionate same-sex male relationships among warriors and knights primarily in the middle ages. Professor Boswell also includes Classical Rome in this category, stating that there was an "almost limitless tolerance of Roman mores" BOSWELL, *SOCIAL*, *supra* note 31, at 91.

⁴¹ Other examples can be found, but they generally do not suggest the same kind of formal coupling. Professor Chauncey argues that the history of male same-sex coupling differs from female same-sex coupling: "The differences between men's and women's power and the qualities ascribed to them in a male-dominated culture were so significant that the social and spatial organization of gay and lesbian life inevitably took very different forms." CHAUNCEY, *supra* note 37, at 27.

⁴² KATZ, *supra* note 36, at 285-318.

⁴³ Even in the literature describing these societies, I find no reference to different-sex couples in which a woman took a dominant role. Of course female-dominated heterosexual relationships may have existed even if they have not found their way into the anthropologic and sociologic studies.

⁴⁴ *Contra* BOSWELL, *UNIONS*, *supra* note 31, at 58-68 (discussing Plato's *Symposium* and heroic military couples).

servant, or eunuch.⁴⁵

It is hard to say when those with same-sex desire began disassociating with the rest of society, or even when they began the process of self-identification.⁴⁶ Generally, there was nothing about committing same-sex acts that made one different, nor was there any possibility of a culture composed from these participants.⁴⁷ Still, persecution of those who committed same-sex acts occurred throughout Western history.⁴⁸ And despite Boswell's contrary argument,⁴⁹ persecution seems to have surrounded the development of Christianity and—in particular—its rejection of sex for any purpose except propagation.⁵⁰

At the same time, however, sexual desire for the same sex or for the different sex, at least for privileged males, was a spectrum and not a chasm. Whether this resulted from an availability of free time and sufficiency of

⁴⁵ See David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 75 OHIO ST. L.J. 491, 516–20 (1994). See also BOSWELL, SOCIAL, *supra* note 31, at 122.

In early law the popular prejudice against an adult male citizen's passivity in sexual relations does not seem to have found official expression, but by the third century it had become a form of *stuprum*. The jurist Paulus opined in his *Sententiae* (2.27.12), collected around 300, that a male who voluntarily underwent *stuprum* (i.e., was passive to another male) should lose half his estate.

Id. (footnote omitted).

⁴⁶ See generally Stephen Hedge, *The Problematics of Identity* (Dec. 9, 1992) (unpublished essay on file with the *Ohio State Law Journal*) (summarizing the related literature).

⁴⁷ "It would be similarly nonsensical to call a figure from the past a homosexual when no such category existed. Many people . . . continue to invest in this fantasy of the homosexual as a separate category of persons defined by a stable sexuality." John Champagne, letter to the editor, *ADVOC.*, Jan. 12, 1993, at 12.

⁴⁸ See generally BOSWELL, SOCIAL, *supra* note 31. I suggest only that Boswell overstates the case for Christian tolerance.

⁴⁹ "This [Christianity] . . . is clearly a justification rather than a cause of prejudice." BOSWELL, SOCIAL, *supra* note 31, at 12.

⁵⁰ Recently, Pope John Paul II reiterated the Catholic church's opposition to gay rights. "Including 'homosexual orientation' among the considerations on the basis of which it is illegal to discriminate can easily lead to regarding homosexuality as a positive source of human rights . . . This is all the more mistaken since there is no right to homosexuality. . . ." Catherine Treasure, *GAY TIME*, Oct., 1992, at 24 (quoting an informal document made public from the Vatican's Congregation for the Doctrine of Faith, the body responsible for defining Roman Catholic Doctrine).

necessities, or of weaker moral values among elites,⁵¹ prevalence of same-sex activity among elites probably ignited hostility and fear of those with same-sex desire. Further, the asocial tag that followed this desire for so much of recent history also followed periods of destabilizing urbanization and less directly—anti-Semitism. It is quite possible that it is another example of “have-nots” being suspicious of “haves”⁵² and/or scapegoating the “other” for deficiencies in resources and failure of expectations.⁵³

The actual identity of homosexuals as a group came recently, for the recognition of companionate same-sex acts itself is a modern phenomenon.⁵⁴

⁵¹ The most recent scholarship rejects these conclusions. Gay subculture has been perceived as middle class or elite, however, this may only be because historians have looked to elite primary sources. For example, Professor Chauncey writes:

But the most visible gay world of the early twentieth century, as the headlines in the *Baltimore Afro-American* suggest, was a working-class world, centered in African-American and Irish and Italian immigrant neighborhoods and along the city's busy waterfront, and drawing on the social forms of working-class culture.

CHAUNCEY, *supra* note 36, at 10.

⁵² The persecution of gays is similar to the persecution of Jews. Professor Boswell writes:

[T]he fate of Jews and gay people has been almost identical throughout European history, from early Christian hostility to extermination in concentration camps. The same laws which oppressed Jews oppressed gay people; the same groups bent on eliminating Jews tried to wipe out homosexuality; the same periods of European history which could not make room for Jewish distinctiveness reacted violently against sexual nonconformity; the same countries which insisted on religious uniformity imposed majority standards of sexual conduct; and even the same methods of propaganda were used against Jews and gay people—picturing them as animals bent on the destruction of the children of the majority.

BOSWELL, SOCIAL, *supra* note 31, at 15–16 (footnote omitted).

See also Erwin J. Haeberle, *Swastika, Pink Triangle, and Yellow Star: The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany*, in Duberman, *supra* note 6, at 365 (arguing that persecution was directed against intellectual and cultural freedom).

⁵³ Boswell argues that it was ruralization—at least from the Roman era to the middle ages—and the increasing absolutism of Roman government that brought with them social intolerance. BOSWELL, SOCIAL, *supra* note 31, at 121–36. Boswell also acknowledges that the rise in intolerance in the late middle ages accompanied a period of continuing urbanization. *Id.* at 270. What does seem to be accepted by all scholars is the notion that urbanization brought with it the development of gay subcultures including gay arts. *Id.* at 334.

⁵⁴ See *infra* part III.

Thus, one could not speak of a gay rights movement until very recently.⁵⁵ And even then, it was more aptly described as a movement for sexual liberation.⁵⁶ Equality based on a class of homosexuals is only a contemporary idea. So it is not surprising that the terms are in such flux. Nor is it surprising—in light of the history—that some feminists see in the gay rights movement an opportunity to break down society's sex roles, and thereby fight sexism in marriage and other institutions.⁵⁷

At first, the gay rights agenda's focus on broadening and liberating sex and sexual desire promised to free women from the lose-lose paradigm of frigid or floozy. If men could assimilate some men's desire for other men, then a woman's desire either for a man or a woman would be less of a threat. Gay rights, many feminists thought, could bring an end to sexual power roles.⁵⁸

⁵⁵ Many people suppose that "Stonewall" was the beginning of the gay rights movement, however, Chauncey and Boswell argue that the roots are much deeper. See BOSWELL, *SOCIAL*, *supra* note 31; BOSWELL, *UNIONS*, *supra* note 31; CHAUNCEY, *supra* note 36; Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993). All three authors reject linear views of gay history in favor of episodic and cyclical notions. There have been many periods of tolerance and many periods of intolerance. Stonewall just marked the end—arguably—of the most recent period of intolerance.

Contra JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970* (1983) (arguing that gay awareness and identity developed in the United States because of World War II, gay bars, the Kinsey Study, and Stonewall); KATZ, *supra* note 36, at 1 ("We have been the silent minority, the silenced minority—invisible women, invisible men.").

Still, Stonewall serves as a valid marker in the development of a modern American gay rights movement. Cf. Law, *supra* note 36.

⁵⁶ "If the first wave of gay liberation was merely about unleashing sexual energy, the second wave is about marriage and family. We are entering the second wave." Chris Bull, *Till Death Do Us Part*, *ADVOC.*, Nov. 30, 1993, at 41, 42 (quoting Andrew Sullivan, Editor, *THE NEW REPUBLIC*).

Professor Rivera argues that the first wave was an anti-assimilationist movement: "They did not fight back for the right to assimilate, to be like everyone else; rather, they fought back because they were visibly 'different' and were tired of being treated as less than human." Rhonda R. Rivera, *Where Are We? Anti-Gay-Lesbian-Bisexual Ballot Attacks Today*, 55 OHIO ST. L.J. 555, 557 (1994).

⁵⁷ "Heterosexism and homophobia work together to enforce compulsory heterosexuality and that bastion of patriarchal power, the nuclear family." PHARR, *supra* note 23, at 16-17.

Catharine MacKinnon and Andrea Dworkin focus much of their work on the sexism and violence in heterosexual relationships. E.g., ANDREA DWORKIN, *INTERCOURSE* (1988); CATHARINE MACKINNON, *FEMINISM UNMODIFIED* (1987).

⁵⁸ To be a lesbian is to be *perceived* as someone who has stepped out of line, who has

Having neither succeeded nor failed in the earliest goals, feminists recently adjudged in the gay rights movement a potential to break down the static and sexist definitions of marriage and family.⁵⁹ Although neither of these movements have seen unanimous support among the affected communities, this later development has been especially contentious.⁶⁰ Some feminists are afraid the gay rights movement threatens women's status. For example, is a gay-rights push for equal recognition of same-sex couples an assimilation into "straight patriarchy"?⁶¹ Further, the gay rights movement has continually

moved out of sexual/economic dependence on a male, who is woman—identified. . . .
A lesbian is perceived as a threat to the nuclear family, to male dominance and control, to the very heart of sexism.

PHARR, *supra* note 23, at 18.

Misogyny gets transferred to gay men with a vengeance and is increased by the fear that their sexual identity and behavior will bring down the entire system of male dominance and compulsory heterosexuality.

Id. at 19.

⁵⁹ Kathleen Gough argues that the family—as we now understand it—is the propagator of patriarchy.

[Family allows men] to deny women sexuality or to force it upon them; to command or exploit their labor to control their produce; to control or rob them of their children; to confine them physically and prevent their movement; to use them as objects in male transactions; to cramp their creativeness; or to withhold from them large areas of the society's knowledge and cultural attainments.

Rich, *supra* note 24, at 232 (footnote omitted) (quoting Kathleen Gough). *See also* Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783 (1988).

Of course, not everyone agrees on an assimilationist approach. *See, e.g.*, Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1993).

⁶⁰ [N]ot all gays and lesbians agree that it is wise to seek official recognition for same-sex families through mainstream institutions such as marriage. Replicating such institutions, they fear will reproduce the sexism and complacency they say is inherent in them.

Bull, *supra* note 21, at 43.

⁶¹ Although most activists that are opposed to same-sex marriage because of the patriarchal roots of marriage support partnership laws and partnership benefits, classism has been a dominant feature of the partnership movement thus far. *See, e.g.*, John Gallagher, *Benefits for the Fringe*, ADVOC., Jan. 25, 1994, at 56.

struggled with its own sexism and racial prejudice⁶² and its history as a counter-cultural movement is far-eclipsed by its history as a privilege of the elite.⁶³ If recognition of same-sex coupling throughout history makes gay family recognition more palatable, it could similarly make it less radical and less beneficial to the feminist movement directly and to other civil rights movements more indirectly.⁶⁴ Still, as *Baehr* suggests, recognition of companionate same-sex couples would effect a redefinition of marriage and family⁶⁵ and a radical change from our modern social norms toward those of less rigid societies.

III. FROM *BOWERS* TO *BAEHR*

"Rule Forty-two. All persons more than a mile high to leave the court."

Everybody looked at Alice.

"I'm not a mile high," said Alice.

"You are," said the King.

"Nearly two miles high," added the Queen.

"Well, I shan't go, at any rate," said Alice; "besides, that's not a regular rule: you invented it just now."

"It's the oldest rule in the book," said the King.

"Then it ought to be Number One," said Alice.

*The King turned pale, and shut his note-book hastily.*⁶⁶

The fortuity surrounding *Baehr* parallels the lack of fortuity surrounding *Bowers*.⁶⁷ Justice Blackmun's files, recently made public, tell us that the vote to grant certiorari prevailed only because Justice Powell expressed an indication that he might overturn the sodomy law. In fact, Powell ended up voting with

⁶² See generally John Gallagher, *Troubled Alliance*, ADVOC., Oct. 5, 1993, at 37, 40. "[T]he gay rights movement has failed to make . . . strides in reversing its own racism [T]he gay and lesbian movement has been wholly ineffectual in dealing with racism and in building coalitions with other progressive communities." *Id.* (quoting Nadine Smith).

⁶³ See, e.g., James Steakley, *Iconography of a Scandal: Political Cartoons and the Eulenburg Affair in Wilhelmin Germany*, in Duberman, *supra* note 36, at 233. *Contra* CHAUNCEY, *supra* note 36 (arguing that in recent American history, homosexual subculture was most pronounced in the working class).

⁶⁴ The same has been said on behalf of focusing the movement on domestic partnership and not marriage in order to create new familial institutions free from our historical constructs.

⁶⁵ The definition of family is being challenged in the law and culture. See, e.g., NANCY ANDREWS, *FAMILY: A PORTRAIT OF GAY AND LESBIAN AMERICA* (1994) (a photojournalistic study).

⁶⁶ CARROLL, *supra* note 1, at 180.

⁶⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

the majority in deciding that there is no fundamental right for homosexuals to engage in sodomy.⁶⁸ This decision, he later indicated, was the biggest mistake of his tenure on the court.⁶⁹ Justice Powell did not think it a mistake to decide that there is no fundamental right to engage in same-sex sodomy, but, he thought, it was a mistake to frame the issue in such terms. Almost any broader language would have either compelled a different decision or a more "straight-forward"⁷⁰ curtailment of the fundamental rights jurisprudence.⁷¹

A. *Bowers v. Hardwick*: *Creating a Legalized Minority*

Because there are many excellent analyses of this opinion elsewhere,⁷² I will limit its discussion here; however, it should be noted that the significance of *Bowers* is often overlooked.⁷³ In terms of constitutional law, *Bowers* curtailed the expansion of fundamental rights and, by limiting substantive due process, opened the door for the Court's restrictions of those rights already

⁶⁸ *Id.* at 187.

⁶⁹ "I think I probably made a mistake on that one." Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3 (quoting retired Supreme Court Justice Lewis F. Powell, Jr.).

⁷⁰ This is an allusion to Professor Rivera's article, Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979) (arguing that homophobia is imbedded in our judicial system).

⁷¹ It is interesting to note that the Court used a variant of substantive due process analysis to limit its late twentieth century foray into substantive due process, and fundamental rights. *Bowers*, 478 U.S. at 186.

⁷² See, e.g., Mitchell L. Pearl, Note, *Making the Best of an Unfortunate Decision*, 63 N.Y.U. L. REV. 154 (1988); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988); Thomas Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987); Yvonne L. Tharpes, Comment, *Bowers v. Hardwick and the Legitimization of Homophobia in America*, 30 HOW. L.J. 829.

⁷³ Rhonda Rivera, (forthcoming) (on teaching *Bowers v. Hardwick*).

outlined.⁷⁴ In terms of "gaylaw,"⁷⁵ *Bowers* is a roadblock at every turn. *Bowers* justifies, in part, the ban on gays in the military,⁷⁶ the denial of custodial awards to gay parents,⁷⁷ the refusal to recognize same-sex couples (in terms of domestic partnership laws, same-sex marriage,⁷⁸ and immigration rights),⁷⁹ and, perhaps most importantly, the legality of limitations on the right of gays to participate in the political process.⁸⁰ The potential for homosexuals

⁷⁴ *Griswold* . . . applied the right of privacy in sexual matters to the marital relationship. *Eisenstadt* . . . however, clearly demonstrates that the right to privacy in sexual relationships is not limited to the marital relationship. Both *Roe* . . . and *Eisenstadt* . . . cogently demonstrate that intimate personal decisions or private matters of substantial importance to the well-being of the individuals involved are protected by the Due Process Clause. The right to select consenting adult sexual partners must be considered within this category. The exercise of that right, whether heterosexual or homosexual, should not be proscribed by state regulation absent compelling justification.

Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1204 (E.D. Va. 1975) (Merhige, J., dissenting), *aff'd*, 425 U.S. 901 (1976). Judge Merhige argues that *Doe* should have followed in the reasoning of the privacy line of cases. *Id.* at 1203-05. By rejecting the privacy cases as controlling in *Doe*, and later in *Bowers*, the Court signaled not only its retreat from gay rights, but also its retreat from privacy as a fundamental right. The Court's subsequent decisions reaffirm this view. *See, e.g., Webster v. Reproductive Health Servs.*, 402 U.S. 490 (1989); *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

⁷⁵ I use this term to refer to the spectrum of legal disciplines encompassed by such comprehensive articles as: *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989); Rhonda R. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1980-81); Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties, Part I*, 10 U. DAYTON L. REV. 459 (1985); Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties, Part II*, 11 U. DAYTON L. REV. 275 (1986).

⁷⁶ Many of the legal battles have hinged on the Pentagon's claim that a homosexual orientation is indistinguishable from illegal sexual conduct and as such is a threat to military discipline and morale. Bull, *supra* note 21, at 29-30.

⁷⁷ *Chicoine v. Chicoine*, 479 N.W.2d 891, 896 (S.D. 1992) (Henderson, J., dissenting). "It appears that homosexuals, such as Lisa Chicoine, are committing felonies, by their acts against nature and God." *Id.*

⁷⁸ *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

⁷⁹ *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982) (although the court does not cite *Bowers*, the legitimacy of constitutionally excluding homosexuals stands as a back-drop against which this decision was made).

⁸⁰ Professor Coles quotes from the brief of the defenders of Colorado Amendment Two, which outlaws non-discrimination on the basis of sexual orientation. "The Supreme

to engage in the illegal act—sodomy⁸¹—is a justification for preclusion from state employment⁸² and sanction of discrimination.⁸³ There are, of course, a host of cultural obstacles that flow from these legal ones.⁸⁴ Further, *Bowers* has forced “gaylaw” and the courts which have had to deal with it to disassociate sex-acts (sodomy) from sexual orientation and the group(s) defined by sexual orientation.⁸⁵

In addition, *Bowers* has created a legal minority, defined by its propensity to do an illegal act. Without *Bowers*, much of the institutional discrimination

Court said in *Bowers*, at the very end of the opinion, that a majority of the Georgia electorate disapproving of gay people is a proper purpose. Therefore, we can invoke that purpose on the basis of *Bowers* despite your rule against improper purposes.” Matthew Coles, *Equal Protection and the Anti-Civil- Rights Initiatives: Protecting the Ability of Lesbians and Gay Men to Bargain in the Pluralist Bazaar*, 55 OHIO ST. L.J. 563, 570 (1994).

⁸¹ Sodomy remains criminalized in Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Montana, Nevada, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Virginia. ALA. CODE § 13A-6-65(a)(3) (1982); ARIZ. REV. STAT. ANN. §§ 13-1411, 1412 (1989); ARK. CODE ANN. § 5-14-122(b) (Michie 1987); FLA. STAT. ANN. § 800.02 (West 1992); GA. CODE ANN. § 16-6-2 (Michie 1992); IDAHO CODE § 18-6605 (1987); KAN. STAT. ANN. § 21-3305 (1988); LA. REV. STAT. ANN. § 14.89 (West 1986); MD. CODE ANN., CRIM. LAW §§ 553-554 (1989); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1972); MONT. CODE ANN. § 45-5-505 (1991); NEV. REV. STAT. § 201.190 (1991); OKLA. STAT. ANN. tit. 21, § 886 (West 1983); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TENN. CODE ANN. § 39-13-510 (1991); TEX. PENAL CODE ANN. § 21.06 (West 1988); UTAH CODE ANN. § 76-5-403 (1990); VA. CODE ANN. § 18.2-361 (Michie 1992).

⁸² Georgia's Attorney General, Michael Bowers, recently withdrew an offer of employment given an Emory University Law School student when he found out that she was marrying a woman. *Bowers v. Shahar*, 836 F. Supp. 859, 861 (N.D. Ga. 1993). Bowers argued that hiring Shahar would harm the image of his office as it enforces Georgia's sodomy statute. *Id.* at 864 n.4.

⁸³ See, e.g., *Childers v. Dallas Police Dept.*, 513 F. Supp. 134, 147 (N.D. Tex. 1981), *aff'd*, 669 F.2d 732 (5th Cir. 1982).

⁸⁴ LESBIANS, GAY MEN, AND THE LAW (William B. Rubenstein ed., 1993).

To lesbians and gay men, this means, as Larry Kramer has written, “We are denied the right to love. Can you imagine being denied the right to love?” Worse still, the U.S. Supreme Court has condoned this oppression, ruling in the *Hardwick* case that our love for one another has no place in American constitutional jurisprudence.

Id. at xvii.

⁸⁵ To avoid *Bowers*, advocates argue that being gay does not necessarily mean that someone will commit sodomy. See *supra* note 20 and accompanying text.

that has plagued other minorities might not have existed for homosexuals. As Professor Boswell wrote: "Majorities, in other words, create minorities, in one very real sense, by deciding to categorize them."⁸⁶

B. Baehr: *Engendering Gay Rights*

National gay activist-attorneys have worried about where and when to bring suits ever since *Bowers*.⁸⁷ Many perceive the *Bowers* fiasco as a failure of timing.⁸⁸ It was not surprising then, that when Nina Baehr and Genora Dancel, Tammy Rodriguez and Antoinette Pregil, and Pat Lagon and Joseph Melilio filed suit against the state for refusing to grant them marriage licenses, they were ostracized. Other marriage challenges had been lost⁸⁹ and no one wanted more damaging precedent. Here, however, fortuity brought them a young court;⁹⁰ and, as hindsight tells us, a social climate suited to such a cultural and normative challenge.⁹¹

Although only alluded to in the *Baehr* plaintiffs' brief,⁹² the gender discrimination claim became the basis of the court's decision. The plurality's

⁸⁶ BOSWELL, SOCIAL, *supra* note 31, at 59. Discrimination against those with same-sex sexual desire, however, long precedes *Bowers*.

⁸⁷ See, e.g., Bull, *supra* note 56, at 46.

⁸⁸ Contra Mary C. Dunlap, *Gay Men and Lesbians Down by the Law in the 1990s USA: The Continuing Toll of Bowers v. Hardwick*, 24 GOLDEN GATE LAW REV. 1, 7 (1994).

⁸⁹ See, e.g., *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); see also *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw.) (responding to *Jones*), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

[T]he Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, and, in effect, because it had theretofore never been the "custom" of the state to recognize mixed marriages, marriage "always" having been construed to presuppose a different configuration. With all due respect to the Virginia courts of a bygone era, we don't believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.

Id. (citations omitted).

⁹⁰ Robin Clark, *Hawaii Under Court Order to Deal With Gay Marriages*, PHOENIX GAZETTE, Sept. 23, 1994, at A31.

⁹¹ See *supra* notes 8-16 and accompanying text.

⁹² Plaintiffs' Brief at 9 n.2, *Baehr* (No. 91-1394-05).

argument that if under the marriage law,⁹³ a woman can not marry a woman and a man cannot marry a man, then the law discriminates on its face on the basis of gender, has been called disingenuous.⁹⁴ In fact, it can be read two ways: either the court put the cart before the horse in much the same way the *Bowers* court did—choosing an outcome and then justifying it⁹⁵—or it chose to see marital definitions as a gender issue in a manner similar to the Supreme Court's analysis of presumptions that men are the primary "breadwinners" in *Frontiero v. Richardson*.⁹⁶ Unlike in *Frontiero*, the *Baehr* court applied strict scrutiny to the gender classification because the Hawaii Constitution contains an equal rights amendment.⁹⁷

1. Gender or Race?

Baehr is a gender case, however, Justice Levinson relied heavily on *Loving v. Virginia*,⁹⁸ a case in which the Supreme Court invalidated miscegenation laws.⁹⁹ Levinson merely substituted racial language in *Loving* with gender language and then followed Chief Justice Warren's reasoning,¹⁰⁰ which dismissed the lower (Naim) court's conclusion that a miscegenous marriage is intrinsically unnatural.¹⁰¹ According to Levinson, "constitutional law may mandate, like it or not, that customs change with an evolving social order."¹⁰²

Scholars have developed arguments linking racism and African-American minority identity with miscegenation statutes. After *Baehr*, parallels between the development of gay identity and African-American identity are easier to draw, but still difficult to defend. The differences between these two groups have been used to justify rejection of gay rights¹⁰³ and to divide the broader

⁹³ HAW. REV. STAT. § 572-1 (1985).

⁹⁴ *Till Death Do Us Part*, ADVOC., June 15, 1993, at 25.

⁹⁵ "Recitation of gay law leads only to one conclusion: the *Rivera Principle*—all the opposition need do is come to court, shout queer, and all bets are off—irrationality reigns, precedents do not hold, and equal treatment disappears from the Constitution."

Rivera, *supra* note 56, at 558.

⁹⁶ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁹⁷ HAW. CONST., art. 1, § 21.

⁹⁸ 388 U.S. 1 (1967).

⁹⁹ *Id.* at 12.

¹⁰⁰ *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ This is, in part, a result of the Court's focus on immutable characteristics. As this Note suggests, the immutability of sexual orientation may become jurisprudentially irrelevant in light of *Baehr*'s adoption of socially constructionist notions of homosexuals,

civil rights movement.¹⁰⁴ Professor Richards argues that focus on difference is misplaced:

Racial prejudice is an invidious political evil precisely because it is directed against central aspects of a person's cultural and moral identity on irrationalist's grounds of subjugation in virtue of that identity. The central point is not that its irrationalist object is some brute fact that cannot be changed, but that it is based on a central feature of moral personality: in particular, "the way people think, feel, and believe, not how they look"—the identifications that make them "members of the black ethnic community."¹⁰⁵

Richards suggests that minorities are defined by self-identification and separate treatment by society and the judicial system. Our Constitution's fundamental protection, Richards argues, is freedom of conscience.¹⁰⁶ Such a reading of this jurisprudence softens the lines between different minority groups and supports the *Baehr* plurality's facile substitution of gender for race in the *Loving* language.

2. But, Are They Even Gay?

Baehr is also notable for what it does not say. *Baehr* sidesteps the sexual orientation issue, suggesting that the marriage law might prevent same-sex heterosexual couples from marrying.¹⁰⁷ By taking this approach, the *Baehr* plurality accepts earlier precedent limiting privacy and marital-rights based

gender, and marriage. If not, recent scientific studies suggest that sexual orientation is genetically determined (possibly immutable). See, e.g., SIMON LEVAY, *THE SEXUAL BRAIN* 120 (1993) (finding a correlation between the size of the hypothalamus and male sexual orientation); *Mom's Fault?*, *ADVOC.*, Aug. 24, 1993, at 30 (discussing an NIH study linking homosexuality to chromosomal structure).

¹⁰⁴ For example, a gay rights opponent argued that African-Americans were "lynched, beaten by police, not allowed to vote, not allowed to eat in restaurants, not allowed to drink at public fountains, not allowed to hold jobs" Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 *HARV. C.R.-C.L. L. REV.* 283, 292 (1993), (citing *Are Gay Rights a Civil Right? David Canton Says No, and He Wants Florida Voters to Close the Debate Forever*, *ORLANDO SENTINEL*, July 18, 1993, at 8); see also *Gay Rights/Special Rights* (a video published by the Traditional Values Coalition).

¹⁰⁵ Richards, *supra* note 45, at 503-04 (quoting F. JAMES DAVIS, *WHO IS BLACK?: ONE NATION'S DEFINITION* (1991)).

¹⁰⁶ *Id.* at 505.

¹⁰⁷ "[P]arties to 'a union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could theoretically be homosexuals or heterosexuals." *Baehr*, 852 P.2d at 51 n.11.

arguments¹⁰⁸ and transcends them. Under *Baehr* it is neither necessary to find that marriage is fundamental nor that the privacy line of cases¹⁰⁹ could encompass the decision to marry someone of the same sex. Instead, *Baehr* assimilates feminist theories of homophobia and separates marriage from sexuality and procreation with which it has been laden since Augustine. If Judeo-Christian definitions of marriage, which limit it to a man and a woman, are sexist, then it is irrelevant whether the plaintiffs are gay or straight.¹¹⁰

Only two justices supported the plurality's analysis: A third wrote a concurring opinion that goes in a very different direction. The concurrence accepts the plurality opinion on the condition that a lower court finds that homosexuals are a suspect class.¹¹¹ It is not clear why, if the issue is gender, it is necessary to find an additional suspect class.¹¹² Because the trial judge

¹⁰⁸ The plurality considers the earlier gay marriage cases and rejects them. *See supra* note 89. It also, however, refuses to make marriage a fundamental right.

[W]e are being asked to recognize a new fundamental right. There is no doubt that "[a]s the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii Constitution, we are free to give broader privacy protection [under article I, section 6 of the Hawaii Constitution,] than that given by the federal constitution." However, we have also held that the privacy right . . . is similar to the federal right The inquiry is whether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of our civil and political institutions [W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people

Baehr, 852 P.2d at 57 (citations omitted).

¹⁰⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Roe v. Wade*, 410 U.S. 113 (1973).

¹¹⁰ *See supra* note 103.

¹¹¹ *Baehr*, 852 P.2d at 70 (Burns, J., concurring).

The dissent notes earlier same-sex marriages cases in which a fundamental right to marriage was rejected. The dissent also rejects the sex-based classification argument. *Id.*, at 71 (Heen, J., dissenting).

The plurality responds: "The rationale underlying Judge Heen's belief, however, was expressly considered and rejected in *Loving* Substitution of 'sex' for 'race' in section 5 for the fourteenth amendment yields the precise case before us together with the conclusion we have reached." *Id.* at 67-68.

¹¹² As used in the Hawaii Constitution, to what extent does the word "sex" refer? In my view, the Hawaii Constitution's reference to "sex" includes all aspects of each person's "sex" that are "biologically fated." The decision whether a person when born will be a male or a female is "biologically fated." Thus, the word "sex" includes the male-female difference. Is there any other aspect of a person's "sex" that is

hearing the case on remand has decided to hear arguments relating to compelling state interest and has not sought testimony regarding the "suspectness" of the sex-based class,¹¹³ it is very likely that Hawaii will become the first state to recognize same-sex marriages.

IV. THE TERMS THEY ARE A CHANGIN'

"Why did you call him Tortoise, if he wasn't one?" Alice asked.

"We call him tortoise because he taught us," said the Mock Turtle angrily: "really, you are very dull!"¹¹⁴

Some may say, it is all sound and fury, that whether courts define a group by what it does, who it desires, or subsumes it within other groups, the group goes on doing whatever it does, being whatever it is. In fact, however, groups in Western culture have developed within and in response to justice as it has affected them. This has been particularly true in the United States, where tensions have flared when the courts have outpaced or lagged behind society.¹¹⁵ These battles over language are real battles, affecting individual lives. Groups fight to be able to label themselves,¹¹⁶ because language is

"biologically fated"?

Baehr, 852 P.2d at 69 (Burns, J., concurring). "If heterosexuality, homosexuality, bisexuality, and asexuality are 'biologically fated,' then the word 'sex' also includes those differences." *Id.*

Essentialist and constructionalist theories of same-sex sexual identity are beyond the scope of this Note. *See supra* note 6. It should be noted, however, that never before has there been as much scientific support for a finding of immutability necessary for suspect class classification. *See supra* note 103. Further, Professor Coles has argued that attorneys can side step the issue of immutability. Coles, *supra* note 80.

¹¹³ Interview with Daniel Foley, lead attorney for the plaintiffs in *Baehr* (Jan. 14, 1995).

¹¹⁴ CARROLL, *supra* note 1, at 142.

¹¹⁵ *See infra* note 136 and accompanying text.

¹¹⁶ Professor Rivera writes:

Language often defines the battles and, in some cases, wins them. In the case of gay men and lesbians, the first fight was to control their own "name." The term "homosexuals" was the label society preferred, a pseudo-medical term that labeled gay men and lesbians as one-dimensional erotic beings who were best described with a medical pathological term. Like "negroes" winning the right to be "blacks" or "African Americans," the gay population has had to fight to control its own definition.

Rivera, *supra* note 56, at 561.

power—particularly in law, where language is precedent, deciding both the instant case and subsequent cases.

A. *Developing Homophobia and Sexism*

At the turn of the century, charges of homosexual conduct made against Kaiser Wilhelm II's entourage and cabinet forced the court and society to define the same-sex activity occurring and clarify their reaction to it.¹¹⁷ Jakob Ernst, a farmer, who was embroiled in the case by virtue of his sexual relationship with Philipp Prince zu Eulenburg-Hertefeld, was characteristically ignorant of definitions and moral perceptions of his sexual acts. He did not even know what to call them.¹¹⁸ To him, there was nothing special—except having a relationship with a member of the aristocracy—about what they had done. This case served to introduce the term homosexuality,¹¹⁹ and in so doing helped define and organize a group self-identified by its recognition of its interest in committing “homosexual” acts.¹²⁰

Later, the “Lesbian Slasher”¹²¹ and the Navy's Newport Training Station inquisition¹²² raised similar socio-legal-definitional battles in American courts. In fact, the Newport example suggests that as recently as the 1940s, American society's objection to same-sex sexuality was ambivalent, or—at least—more closely related to traditional objections to blurring the gender lines and “feminizing” men. The Navy found nothing wrong with enlisting its sailors to search out “fairies” and have sex with them in order to create evidence of the “fairies” misconduct. As long as a man abstained from engaging in the feminine sexual role, it seems, there wasn't anything *terribly* offensive about same-sex sexual conduct. “Navy officials never considered prosecuting the many sailors . . . who were being serviced by the fairies each year,” Professor

¹¹⁷ Steakley, *supra* note 63, at 233.

¹¹⁸ Ernst testified: “If I have to say it: What people say is true. What it's called I don't know. He taught it to me. Having fun. Fooling around. I don't know of no real name for it. When we went rowing we just did it in the boat.” *Id.* at 253 (citing Maximilian Harden, *Fürst Eulenburg*, in 3 PROZESSE 173, 258 (1913)).

¹¹⁹ A homosexual is “an effeminate man, a person who confounded sex-role stereotypes by virtue of his emotionality, passivity, artistic temperament, emotional attachment to men” *Id.* at 251.

¹²⁰ *Id.*

¹²¹ Lisa Duggan, *The Trials of Alice Mitchell: Sensationalism, Sexology, and the Lesbian Subject in Turn-of-the-Century America*, 1993 SIGNS 791, 794 (a murder trial in which a woman stabbed the female object of her unrequited love).

¹²² George Chauncey, Jr., *Christian Brotherhood or Sexual Perversion? Homosexual Identities and the Construction of Sexual Boundaries in the World War I Era*, in Duberman, *supra* note 6, at 294.

Chauncey writes, "because they did not believe that the sailors' willingness to allow such acts 'to be performed upon them' in any way implicated their sexual character as homosexual."¹²³

B. Baehr's Relativism v. Augustine's Absolutism and Posner's Pragmatism

Under *Bowers*, gay rights threatened to become—perversely—separate from sex, the original "orienting" commonality. Now, after *Baehr*, gay rights could be subsumed within the movement for equal rights for women. Gay activists may not be ready to give up their separateness so quickly after winning recognition of it,¹²⁴ nor may all feminists be willing to include among their ranks homosexuals or accept so easily the notion that gay men are bound by the same social ties as women. The crucial distinction brushed aside by the *Baehr* court is the basic physiologic difference between women and men—whether gay or straight.¹²⁵ Some scholars argue that the broader opportunities present for women in non-Western societies was most directly a result of communal child rearing.¹²⁶ In fact, some feminist scholars locate the root of sexism in the fundamental relationship of men and women to the child-rearing experience.¹²⁷ This paradigm finds support in our courts' examination of marriage before *Baehr*, in which the male-female dynamic was found to be the

¹²³ *Id.* at 305. Similarly, Boswell finds the first prohibitions against same-sex unions suggest an emphasis on gender roles and not sex-acts. "When a man marries a [man] as if he were a woman, what can he be seeking, where gender has lost its place?" BOSWELL, UNIONS, *supra* note 31, at 85 (quoting CODE TH. 9.7.3).

¹²⁴ [W]hile some would try to constitute "identity" as the ground for claiming larger social inclusion (e.g., we are the same as everybody else and hence should not be treated differently), others would use "difference" as a strategy to interrupt the hegemony of dominant social/sexual arrangements (e.g., we are different and our difference will resist those practices that try to make us the same).

Cohen, *supra* note 22, at 73.

¹²⁵ Professor Dorothy Dinnerstein argues that these physiologic differences are the roots of gender inequality. DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGMENTS AND HUMAN MALAISE* 10-26 (1963); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 614 (1992).

¹²⁶ *See id.* Cf. HÉLÈNE CIXOUS & CATHERINE CLÉMENT, *THE NEWLY BORN WOMAN* (Betsy Wing trans., 1986) (noting that women are defined by motherhood).

¹²⁷ *See generally* KATHLEEN GERSON, *HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD* 29-37 (1985); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 46-47 (1982).

defining feature of an institution created to propagate our species.¹²⁸ Of course, with contemporary developments in technology and a trend towards dismantling the nuclear family, these notions have less meaning. Similarly, Freudian analysis of sexuality is rooted in women's solitary child-rearing responsibility.¹²⁹ Both the legal and psychological conclusions serve to further sexist roles, which the push for recognition of same-sex relationships can marginalize by destabilizing our notions of family.

But can freeing propagation from marriage separate women from their fundamental role any more than freeing sodomy from sexual orientation freed gays from discrimination? Most courts have failed to recognize that *Bowers* affirmed only the criminalization of sodomy and did not establish that homosexuals are criminals per se because of their propensity to engage in it. The truth remains that Augustine's writings on sex¹³⁰ repeatedly work their way into academic and applied explorations. Justice Burger's concurrence in *Bowers* is always there, as a haunting recognition of the centrality of Judeo-Christian absolutes in equal and fundamental rights analysis.¹³¹

As Eskridge notes, a new, more serious notion has crept into our legal paradigms.¹³² Pragmatism has become the ultimate value—roused everywhere. The Honorable Richard Posner, probably America's most preeminent living legal scholar, delved into gay civil rights issues in his work *Sex and Reason*.¹³³ He attempted to apply law and economic principles to the gay rights agenda.¹³⁴

¹²⁸ "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).

¹²⁹ See, e.g., Nancy Chodorow, *Mothering Male Dominance and Capitalism*, in CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 83, 84-86 (Zilla H. Eisenstein ed., 1979).

¹³⁰ See Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 How. L.J. 173, 181-83 (1992).

¹³¹ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). "Condemnation of those [homosexual] is firmly rooted in Judeo-Christian moral and ethical standards." *Id.*

¹³² See William N. Eskridge, *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992) (book review) (arguing that Posner's work displays a tension between libertarian principles and pragmatic impulses); Jason S. Johnston, *Not So Cold An Eye: Richard Posner's Pragmatism*, 44 VAND. L. REV. 741 (1991).

¹³³ RICHARD A. POSNER, *SEX AND REASON* 291 (1992).

¹³⁴ Eskridge, *supra* note 132, at 341.

[I]n place of moral arguments, Posner advocates utilitarian cost-benefit analysis as the lodestar for justifying any regulation of sexuality. That is, regulations of sexual behavior

Although this process could expose weaknesses in simpler Judeo-Christian analyses of these issues, it stops short, arguing against the product of its own analysis. According to Posner, same-sex marriage is so far beyond our society's values that whatever economic rationality it possesses is overcome by the social costs of making such a change: Economic efficiency is limited by pragmatism.¹³⁵ Posner's analysis removes the courts from their historic role as developers of social norms. Would *Brown v. Board of Education*¹³⁶ have been rational under Posner's model? Even less socially provoking cases might also have failed. Consider *Miranda v. Arizona*.¹³⁷ Nevertheless, Posner's examination indicates two important developments: First, a mainstream (most would even say conservative) legal scholar is tackling the problems of gaylegal jurisprudence. Second, Posner displays an inherent acceptance of relative definitions of socially defining terms. By examining the economic rationality of restrictions against gays in society, he rejects the absolutism of Augustine¹³⁸ and Justice Burger.¹³⁹ Nevertheless, Posner's pragmatism stops short, reincorporating moral values and sacrificing libertarian principles when they lead to unpopular results (but what is unpopular now may not be unpopular tomorrow).¹⁴⁰

must be justified by a fact-based demonstration that the behavior has generated "externalities" (costs of individual behavior imposed upon third parties without their consent) and that the regulation will reduce the externalities without itself imposing excessive costs.

Id. at 342.

¹³⁵ *Id.* at 347.

¹³⁶ 347 U.S. 483 (1954) (requiring desegregation of public schools).

¹³⁷ 384 U.S. 436 (1966) (requiring the government to warn defendants who are in custody of their rights under the Fifth and Sixth Amendments).

¹³⁸ At the heart of Patristic writing was an aversion to sex. Patristic writers in general believed that the best way of life was that of a perfect continence. Indeed, they loathed sex and saw it as something that could interfere with the religious way of life. Thus, the Church Fathers viewed marriage suspiciously as a type of "indulgence" for those not morally strong enough to abstain. These Patristic writers believed that "it was never good for people to have sexual relations; in marriage the evil might be mitigated, even forgiven—but only under certain circumstances."

Friedman, *supra* note 130, at 181 (quoting James A. Brundage, *Allas! That Evere Love Was Synne: Sex and Medieval Canon Law*, CATH. HIST. REV. 4 (1986). Aquinas believed that any non-procreative sexual act was an unnatural vice. *Id.* at 185.

¹³⁹ Rivera has argued that this is part of a broader homophobia in our courts "the Rivera principle." See *supra* notes 56, 75.

¹⁴⁰ Eskridge, *supra* note 132, at 351.

The *Baehr* plurality may not be as disingenuous, then, as it first seems. Not only is there a basis for finding gender discrimination and sex-role stereotypes in the plain language of the marital statute, but there are also no reasons—outside of our Augustinian focus on propagation—to assume that a marriage is an inherently sexual relationship. Why couldn't, as the *Baehr* opinion suggests, there be a marriage of two same-sex heterosexual people—committed to the health and well-being of each other?¹⁴¹ Historically, marriage has more often been an economic and contractual relationship than a romantic and sexual one.

Baehr is certainly, as Posner might say, unsensible; however, as Posner's work suggests, when the terminology is recognized as inchoate, the law changes as society changes. Apparently, for at least two justices, marriage is an inherently inchoate term and its present incarnation is inefficient and unnecessary.

V. TOTO, I DON'T THINK WE'RE IN HAWAII ANYMORE

If civil rights litigation moves from the federal courts to the state courts, full faith and credit will be a fulcrum whenever a transportable right or status is implicated. For example, when, where, and under what circumstances will a Hawaii same-sex marriage be recognized? Family law presents unique choice of law issues.¹⁴² Although the validity of divorce decrees continues to be questioned,¹⁴³ there is a trend to recognize both prior divorce decrees and marriage if valid where celebrated.¹⁴⁴

The *Restatement (Second) of Conflict of Laws* adopts this position, but also allows a public policy exception. Section 283 states:

(1) The validity of marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in section 6.

(2) A marriage which satisfies the requirements of the state where the

¹⁴¹ Professor Boswell writes: "In very few human societies do similar assumptions [that romantic love and marriage are inextricable] prevail." BOSWELL, *UNIONS*, *supra* note 31, at xx. Marriage has more commonly been an economic relationship. Also note that Boswell suggests that marriage itself is an undefined and changeable term. *Id.* at xxi.

¹⁴² *E.g.*, Willis L.M. Reese, *Marriage in American Conflict of Laws*, 26 INT'L & COMP. L.Q. 952, 953 (1977).

¹⁴³ Caust-Ellenbogen, *supra* note 26, at 641.

¹⁴⁴ J. Phillip Johnson, Note, *The Validity of a Marriage Under the Conflict of Laws*, 38 N.D. L. REV. 442, 456 (1962).

marriage was contracted will everywhere be recognized as valid unless it violates the stronger public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.¹⁴⁵

Recognizing the section 283(2) exception, some states have already passed legislation explicitly saying that *Baehr* is obnoxious to its public policy.¹⁴⁶ A similar result will probably hold in those states that still criminalize sodomy.¹⁴⁷

Professor Barbara Cox develops a framework in which to analyze these conflict of law problems.¹⁴⁸ Cox begins her analysis by dividing the states by the type of statutes that they have in place. Twenty-two states have adopted variations of the Uniform Marriage and Divorce Act:¹⁴⁹

All marriages contracted within this state prior to January 1, 1974, or outside this state that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties are valid in this state.¹⁵⁰

The Uniform Marriage and Divorce Act comments state: "[This section] expressly fails to incorporate the strong public policy of the Restatement

¹⁴⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1969).

¹⁴⁶ Related measures have been proposed in Utah, (Dan Harrie, *Bill Drafted to Bolster Ban on Homosexual Marriages: Utah Gay, Lesbian Activists Call Proposal Discrimination: Homosexual Marriages Would Be Banned By Bill*, SALT LAKE TRIB., Feb., 9, 1995, at B1), Arizona, Missouri, Oregon, Washington, Nevada, Idaho, and Michigan. Bettina Boxall, *Anti-Gay Rights Measures Ignite Aggressive Battles in 7 States*, L.A. TIMES, June 9, 1994, at A5. For an examination of the difficulties in preventing recognition of a same-sex marriage, see Joseph W. Mcknight, *Family Law: Husband and Wife*, 48 SMU L. REV. 1225 (1995).

¹⁴⁷ See *supra* note 81. Homer suggests that in states where a same-sex marriage is recognized and sodomy is criminalized, *Bowers* might suggest a different standard for married and unmarried same-sex couples—raising for the first time in gay culture the concept of premarital sex. Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 513 (1994).

¹⁴⁸ Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1041; see also Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551 (1994); Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499 (1995).

¹⁴⁹ Cox, *supra* note 148, at 1066.

¹⁵⁰ COLO. REV. STAT. ANN. § 14-2-112 (West 1991).

(Second) and hence may change the law in some jurisdictions. This section will preclude invalidation of many marriages which would have been invalidated in the past."¹⁵¹ In these states all marriages have been accepted—even where contrary to statutory policy—unless expressly prohibited.¹⁵² (Only two states explicitly prohibit same-sex marriages.)¹⁵³ Still, Cox suggests the remaining states will probably turn to public policy in determining the validity of the marriage.¹⁵⁴

Five states have adopted the Uniform Marriage Evasion Act of 1912, which states:

If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state.¹⁵⁵

These states will probably reject a Hawaii same-sex marriage. If, however, these courts follow precedent requiring express statutory prohibitions in the law, they may be forced to validate the marriage.¹⁵⁶

According to Cox, the remaining states follow either the *First Restatement* or: "some alternative choice-of-law approach; chief among them Brainerd Currie's 'governmental interest analysis,' the *Second Restatement*'s 'most significant relationship' test and Robert A. Leflar's 'Choice-influencing considerations.'"¹⁵⁷

Under the *First Restatement*, states will either validate the marriage because they are "understandably reluctant 'to negate a relationship upon which so many personal and governmental relationships depend,'"¹⁵⁸ or find same-sex marriage to be sufficiently like polygamous and incestuous marriage to be excepted as morally offensive. States following Currie's "governmental interest approach" will likely apply their own marriage law and deny recognition to the same-sex couple.¹⁵⁹ The *Second Restatement*'s approach leads states to public

¹⁵¹ UNIF. MARRIAGE AND DIVORCE ACT § 210, 9A U.L.A. 176 (1987).

¹⁵² Cox, *supra* note 148, at 1069.

¹⁵³ *Id.* at 1070.

¹⁵⁴ *Id.*

¹⁵⁵ These states include Illinois, Louisiana, Massachusetts, Vermont, and Wisconsin. Henson, *supra* note 148, at 567 n.55.

¹⁵⁶ Cox, *supra* note 148, at 1077.

¹⁵⁷ *Id.* at 1083 (footnotes omitted).

¹⁵⁸ *Id.* at 1085.

¹⁵⁹ *Id.* at 1092.

policy considerations.¹⁶⁰ And finally, under Leflar, judges are given wide discretion in choosing whether to apply the "better law."¹⁶¹

Cox's article, however, merely introduces the subject, as it neglects the distinction the Supreme Court has drawn between statutes and judgments,¹⁶² precedent that leads to almost perpetual review of true conflict of law cases,¹⁶³ and the limitless complexity of alternate facts. Further, Cox's analysis presumes two citizens of state X marry in Hawaii and return to X. What if the putative spouses are from different states? What if they own property in a different state? What if they later move to a new state? What if when passing through a new state, they try to invoke some spousal right or one spouse dies? Each time the variables change, the analysis shifts. The possible complexity is seemingly endless, and may in itself be the best argument to convince courts to recognize a Hawaii same-sex marriage.

Baehr's adoption of a social constructionist critique of marriage will spur a wave of re-analysis and lawmaking. Since, marriage has been defined as a status bringing with it a bundle of rights,¹⁶⁴ a court might recognize a Hawaii

¹⁶⁰ *Id.* at 1096.

¹⁶¹ *Id.* at 1097.

¹⁶² See Brilmayer, *supra* note 26.

¹⁶³ A "true conflict" arises when two or more states have equal—or legitimate—interest in the controversy. For example, a same-sex couple from Ohio who marry in Hawaii, might find an Ohio court unwilling to apply Hawaii law. As Ohio domiciliaries, Ohio law should control. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963). But see Robert A. Leflar, *True "False Conflicts," et Alia*, 48 B.U. L. REV. 164, 169 (1968) (arguing that a "true conflict" arises whenever two state laws could be applied).

Courts do not seem to follow either pattern consistently. See, e.g., *Ram v. Ramharack*, 571 N.Y.S.2d 190 (N.Y. Sup. Ct. 1991) (recognizing a common law marriage, although New York had outlawed such, because the marriage was consummated in Washington, D.C.); *Mogowan v. Mogowan*, 226 N.E.2d 304 (N.Y. 1967) (husband could not attack wife's divorce decree except in the state where the divorce took place); *Sacks v. Sacks*, 263 N.Y.S.2d 891 (N.Y. Sup. Ct. 1965) (not recognizing personal jurisdiction on second wife in another state in action by first wife for annulment of the second marriage); *Chusid v. Chusid*, 142 N.Y.S.2d 846 (N.Y. Sup. Ct. 1955) (allowing second marriage to be rendered valid by the retroactive divorce action of husband's first wife according to Nevada law); *In re Perart's Estate*, N.Y.S.2d 879 (N.Y. App. Div. 1950) (consequences which would affect validity of Virginia divorce decree will not affect parties residing in New York); *Verbeck v. Verbeck*, 65 N.Y.S.2d 265 (N.Y. Sup. Ct. 1946) ("a foreign divorce decree may not be attacked collaterally where the issue of residence was contested in the foreign jurisdiction.").

¹⁶⁴ These rights include:

(1) a variety of state income tax advantages, including deductions, credits, rates,

same-sex marriage, but follow its own statutes—as they are quite free to do—in allocating those rights that flow from the marriage on some basis that excludes same-sex couples. Same-sex couples may find themselves married, but with a marriage without the accompanying rights. Like the soldier serving under “don’t ask, don’t tell,” who can be gay but can neither discuss it publicly nor act on her gayness, the same-sex couple may be married, but may not receive spousal employment benefits, such as tax-benefits, right to intestate succession, and the like.¹⁶⁵ Judicial language might not only become relative and fluid, it

exemptions, and estimates; (2) public assistance from and exemptions relating to the Department of Human Services; (3) control, division, acquisition, and disposition of community property; (4) rights relating to dower, curtesy, and inheritance; (5) rights to notice, protection, benefits, and inheritance under the Uniform Probate Code; (6) award of child custody and support payments in divorce proceedings; (7) the right to spousal support; (8) the right to enter into premarital agreements; (9) the right to change of name; (10) the right to file a nonsupport action; (11) post-divorce rights relating to support and property division; (12) the benefit of the spousal privilege and confidential marital communications; (13) the benefit of the exemption of real property from attachment or execution; and (14) the right to bring a wrongful death action.

Baehr v. Lewin, 852 P.2d 44, 59 (Haw.), *reconsideration granted in part*, 975 P.2d 225 (Haw. 1993) (citations omitted). See also Kevin A. Zambrowicz, Comment, “*To Love and Honor All The Days of Your Life*”: A Constitutional Right to Same-Sex Marriage?, 43 CATH. U. L. REV. 907, 908 n.5 (1994). But is not marriage more than the sum of its parts? If marriage becomes something less than status there will be no predictability in the law. As the problem presented in this section suggests, marriage as a bundle of rights would lead to a litigious state. Cox, *supra* note 148, at 1092.

¹⁶⁵ According to the Plaintiffs’ Memorandum in Opposition to Defendant’s Motion for Judgment on the Pleadings, the following rights and benefits are contingent on marital status in Hawaii:

Veteran’s preference to spouse in public employment; vacation allowance on termination of public employment by death; funeral leave for government employees; travel and transportation expenses of government employees; accidental death benefits for surviving spouse for government employees; assistance to disabled persons; lease of agricultural parks; continuation of rights under existing homestead leases, certificates of occupation, right to purchase leases and cash free hold agreements concerning the management and disposition of public land; inheritance of land patent; lower hunting license fee; eligibility for housing opportunity allowance program of the Housing Finance and Development Corporation; tax relief for natural disaster losses; income tax deductions, credits, rates, exemptions, and estimates; homes of totally disabled veterans exempt from property taxes; exemption from conveyance from tax; airport relocation assistance for disabled persons; non-resident tuition deferential waiver; making, revoking, and objecting to anatomical gifts; rights and proceedings for involuntary hospitalization and treatment; legal status and the rights, privileges, duties, and obligations of a child; waiver of fees for certified copies and searches of vital statistics; disclosure of vital statistics record;

may become irrelevant. This, however, is overly simplistic. Some state will likely accept *Baehr* without such subterfuge, and in the states that do not, the legislatures and courts will have to walk a careful path in order to separate all the fruit from the tree without creating new legal challenges.

Congress, too, will have to respond to *Baehr*. Federal legislation generally applies benefits based on marital status however a state creates it. In the past these differences have been narrowly drawn over such issues as common-law marriage, marrying next-of-kin, and marrying under the age of majority. Some in Congress would surely fight extending federal entitlements to same-sex couples. The same-sex couple will probably find themselves in a maze in which neither status nor language is unchanged. Whether they find the equality for which they fought, or merely find language that is what it is not, is unclear.

VI. CONCLUSION: DOES IT MEAN ANYTHING?

"Would you tell me, please, which way I ought to go from here?"

permission to make arrangements for burial or cremation; public assistance from the Department of Human Services; exemption from real property lien of Department of Human Services of allowance to surviving spouse; exemption from real property lien of Department of Human Services of allowance to surviving spouse; exemption from claims of Department of Human Services for social service payments, financial assistance, or burial payments; notice of guardian ad litem proceeding; criminal injuries compensation; burial of servicemen's dependents; payment of worker's compensation benefits after death; payment of wages to relative of deceased employee; beneficial owner status of corporate securities; proof of business partnership; insurance licenses, coverage, eligibility, and benefits; organization of mutual benefits society; in vitro fertilization procedure coverage; consent to a postmortem examination; right to a gasoline dealer franchise; control, division, acquisition, and disposition of community property; exemption from regulations of condominium sales to owner-occupants; sole interest on property; qualification as facility for the elderly; notice to probate proceeding, rights by way of dower or courtesy, right to inherit property; appointment as guardian of minor; right of survivorship to custodial trust; rights to notice, protection, benefits and inheritance under the Uniform Probate Code; award of child custody in divorce proceedings; support payments in divorce action; right to support from spouse; right to enter into premarital agreement; right to change name; right to file action for nonsupport; right to support after divorce; division of property after dissolution of marriage; spousal privilege and confidential marital communications; real property exempt from attachment or execution; right to sue for tort and death by wrongful act; right to be notified of parole or escape of inmate; bill of rights for victims and witnesses; and succession to Hawaii Homes Commission leases. Plaintiffs' Brief at 20-23, *Baehr* (No. 91-1394-05) (citations omitted).

*"That depends a good deal on where you want to get to," said the Cat.*¹⁶⁶

The only thing certain after *Baehr*, is that although it takes us far, it leaves far to go. Every state supreme court will hear arguments on the full spectrum of gay-legal issues. Judges will decide whether their distaste for same-sex marriage is overcome by America's larger interest in comity. This process offers opportunities to challenge society's assumptions. Women—and, in fact, all minorities could gain by the discourse.

The *Baehr* plurality has brought social constructionist analysis into American jurisprudence. Like Posner's libertarian "law and economics," social constructionism recognizes that society changes over time and differs from culture to culture and that law should adapt to these changes. By bringing sexual orientation into the fold of sex, *Baehr* directly attacks the Supreme Court's recent retreat to Judeo-Christian norms (or "Natural Law") evidenced in *Bowers*.

There is a risk, however, that this taste of change in our laws and social constructs could be too much for society to handle. The Supreme Court, in fact, might embrace the limit on Posner's libertarianism and pragmatism, and decide the time is not ripe for *Baehr*'s challenge. In so doing, the Court would sacrifice comity and growth in our law and culture in favor of stability.

¹⁶⁶ CARROLL, *supra* note 1, at 89.